

The Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP A. SMITH and
KIMBERLY G. SMITH,

Defendants.

Case No. 3:10-cv-05364-BHS

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendants Philip A. Smith and Kimberly G. Smith (collectively, "Defendants"), alleging that Defendants violated Sections 301(a) and 309(d) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1319(d);

WHEREAS, the Complaint alleges that Defendant Philip A. Smith violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material without authorization by the United States Department of

CONSENT DECREE
Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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1 the Army (“the Corps”) into waters of the United States on property (specifically, Lewis County
2 Assessor Parcel Numbers 011969-013-001, 011969-013-002, 011969-001-001, 011969-001-002,
3 and 011970-000-000, referred to hereinafter as the “Site”) that was, at the time of the discharges,
4 co-owned by Defendants;

5 WHEREAS, Defendant Philip A. Smith has pled guilty to violating CWA Section 301(a)
6 as set forth in the Complaint in *United States v. Smith*, No. 3:09-cr-05590-BHS (W.D. Wash.),
7 and has been sentenced to 6 months probation and ordered to pay a \$20,000 in restitution to the
8 EPA;
9

10 WHEREAS, the Court in *United States v. Smith*, No. 3:09-cr-05590-BHS (W.D. Wash.)
11 waived imposing a criminal fine upon Defendant Philip A. Smith based on its finding that he is
12 financially unable and is unlikely to become able to pay such a fine;

13 WHEREAS, the Complaint also alleges that Defendant Philip A. Smith violated CWA
14 Section 309(d) by failing to comply with an administrative order issued by the EPA requiring
15 Mr. Smith to restore wetlands and headwater streams to their pre-fill conditions;

16 WHEREAS, Defendant Philip A. Smith has failed to comply with the EPA’s
17 administrative order requiring him to restore the wetlands and streams he disturbed to their pre-
18 fill condition;
19

20 WHEREAS, the Complaint seeks, among other things, (1) to enjoin the discharge of
21 pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. §
22 1311(a); and (2) to require Defendants, at their own expense and at the direction of the EPA, to
23 restore and/or mitigate the damages caused by their unlawful activities;
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25 CONSENT DECREE
26 Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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1 WHEREAS, Defendant Philip A. Smith has been ordered to pay the Washington State
2 Department of Ecology \$232,000 for construction storm water discharge violations, which are
3 related to the violations set forth in the Complaint;

4 WHEREAS, the individuals holding mortgage liens on the Site have either foreclosed on
5 the Site or initiated foreclosure proceedings that will be concluded by October 31, 2011, and
6 Defendants warrant that after October 31, 2011, they no longer will hold title to or hold any other
7 legally cognizable interest in the Site;

8 WHEREAS, the wetlands on the Site have begun to restore themselves since Defendant
9 Philip Smith's violations occurred, and are expected to continue to restore themselves over the
10 next few decades;

11 WHEREAS, the settlement of this case is predicated on Defendants' inability to pay for
12 restoration and mitigation and, therefore, the violations will, for purposes of 33 C.F.R. § 326.3,
13 be deemed to be unresolved until such time as the EPA determines that all wetlands and streams
14 on the Site have been fully restored;

15 WHEREAS, the United States and Defendants agree that settlement of this case is in the
16 public interest and that entry of this Consent Decree is the most appropriate means of resolving
17 the United States' claims under the CWA against Defendants in this case; and

18 WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement
19 of the United States' claims against Defendants in this case, and that this Consent Decree
20 protects, to the extent possible, the public interest in accordance with the CWA and all other
21 applicable federal law.

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25 CONSENT DECREE
Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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1 THEREFORE, before the taking of any testimony upon the pleadings, without further
2 adjudication of any issue of fact or law, and upon consent of the parties hereto by their
3 authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

4 I. JURISDICTION AND VENUE

5 1. This Court has jurisdiction over the subject matter of these actions and over the
6 parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33
7 U.S.C. § 1319(b).

8 2. Venue is proper in the Western District of Washington pursuant to CWA Section
9 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct
10 business in this District, the subject property is located in this District, and the causes of action
11 alleged herein arose in this District.

12 3. The Complaint states claims upon which relief can be granted pursuant to
13 Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

14 II. APPLICABILITY

15 4. The obligations of this Consent Decree shall apply to and be binding upon:
16 Defendants; Defendants' officers, directors, agents, employees and servants; Defendants'
17 successors and assigns; and any person, firm, association or corporation who is, or will be, acting
18 in concert or participation with any of the Defendants, including, but not limited to, any entity in
19 which they have any financial or commercial interest of any kind, whether or not such person has
20 notice of this Consent Decree. In any action to enforce this Consent Decree against any of the
21 Defendants, the Defendants shall not raise as a defense the failure of any of its officers, directors,
22 agents, employees, successors or assigns or any person, firm or corporation acting in concert or

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25 CONSENT DECREE
Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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participation with the Defendants, to take any actions necessary to comply with the provisions hereof. For purposes of this Consent Decree, the phrase “Defendants’ successors and assigns” shall not include persons, other than Defendants, who acquired their interest in the Site before October 31, 2011, and shall not include the successors and assigns of those persons who acquired their interest in the Site before October 31, 2011.

5. The transfer of ownership or other interest in the Site shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Site, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the EPA and the United States Department of Justice at the addresses specified in Section IX below that such notice has been given. As a condition to any such transfer, the Defendants making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under CWA Section 301 concerning the Site.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

CONSENT DECREE
Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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1 8. Defendants' obligations under this Consent Decree are joint and several.

2 9. Except as in accordance with this Consent Decree, Defendants and Defendants'
3 agents, successors and assigns are enjoined from discharging any pollutant into waters of the
4 United States, unless such discharge complies with the provisions of the CWA and its
5 implementing regulations.

6 10. This Consent Decree is not and shall not be interpreted to be a permit or
7 modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33
8 U.S.C. §§ 1342 or 1344, or any other law.

9 11. This Consent Decree in no way affects or relieves Defendants of their
10 responsibility to comply with any applicable federal, state, or local law, regulation or permit.

11 12. This Consent Decree in no way affects the rights of the United States as against
12 any person not a party to this Consent Decree.

13 13. The United States reserves any and all legal and equitable remedies available to
14 enforce the provisions of this Consent Decree and applicable law.

15 14. Nothing in this Consent Decree shall constitute an admission of fact or law by any
16 party.

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19 IV. CIVIL PENALTIES

20 15. Defendant Philip Smith shall pay a civil penalty to the United States in the
21 amount of Two Hundred Thousand Dollars (\$200,000.00), within 30 days of the date of the
22 acquisition of any interest in title to the Site, or any portion of the Site, by one or both
23 Defendants or by any entity in which one or both Defendants have an interest.

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25 CONSENT DECREE
26 Case No. 3:10-cv-05364-BHS

 U.S. DEPARTMENT OF JUSTICE
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16. Defendant Philip Smith shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing EPA Region 10 and the DOJ case number (DJ # 90-5-1-1-18599). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Washington. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section V of this Consent Decree, that such payment was made in accordance with Paragraph 17.

18. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

V. ADDRESSES

19. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

Ankur K. Tohan
 Assistant Regional Counsel
 United States Environmental Protection Agency
 Region 10
 1200 6th Ave, Suite 900 (ORC-158)
 Seattle, Washington 98101

1 B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

2 Letitia Grishaw, Section Chief
3 Environmental Defense Section
4 Environment and Natural Resources Division
5 U.S. Department of Justice
6 P.O. Box 23986
7 Washington, D.C. 20026-3986

8 C. TO DEFENDANTS:

9 Philip A. Smith
10 Kimberly G. Smith
11 1536 Bishop Road
12 Chehalis, Washington 98532

13 VI. COSTS OF SUIT

14 20. Each party to this Consent Decree shall bear its own costs and attorneys' fees in
15 this action. Should Defendants subsequently be determined by the Court to have violated the
16 terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys'
17 fees incurred by the United States in any action against Defendants for noncompliance with or
18 enforcement of this Consent Decree.

19 VII. PUBLIC COMMENT

20 21. The parties acknowledge that after the lodging and before the entry of this
21 Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R.
22 § 50.7, which provides for public notice and comment. The United States reserves the right to
23 withhold or withdraw its consent to the entry of this Consent Decree if the comments received
24 disclose facts which lead the United States to conclude that the proposed judgment is
25 inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose

26 CONSENT DECREE
Case No. 3:10-cv-05364-BHS

U.S. DEPARTMENT OF JUSTICE
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1 entry of, or to challenge any provision of this Consent Decree, unless the United States has
2 notified the Defendants in writing that it no longer supports entry of the Consent Decree.

3 VIII. CONTINUING JURISDICTION OF THE COURT

4 22. This Court shall retain jurisdiction over this action in order to enforce or modify
5 the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as
6 may be necessary or appropriate for construction or execution of this Consent Decree. During
7 the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to
8 construe and effectuate the Consent Decree.
9

10 IX. MODIFICATION

11 23. Upon its entry by the Court, this Consent Decree shall have the force and effect of
12 a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take
13 effect unless signed by both the United States and the Defendants and approved by the Court.

14 IT IS SO ORDERED.

15 Dated and entered this _____ day of _____, 2011.
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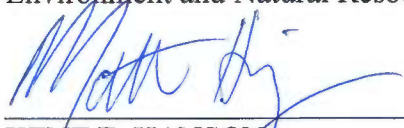
17 _____
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19 United States District Judge
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25 CONSENT DECREE
26 Case No. 3:10-cv-05364-BHS

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1 ON BEHALF OF THE UNITED STATES:
2
3

4 IGNACIA S. MORENO
5 Assistant Attorney General
6 Environment and Natural Resources Division



Dated: 10/6/11


7 KENT E. HANSON
8 MATTHEW B. HENJUM
9 U.S. Department of Justice
10 Environment and Natural Resources Division
11 Environmental Defense Section
12 601 D Street, N.W., Suite 8000
13 Washington, DC 20004
14 (202) 514-2327 (Hanson)
15 (202) 514-2285 (Henjum)
16 Fax: (202) 514-8865
17 Kent.Hanson@usdoj.gov
18 Matthew.Henjum@usdoj.gov
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25 CONSENT DECREE
26 Case No. 3:10-cv-05364-BHS

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1 United States Environmental Protection Agency

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3 
4 MARK POLLINS, Director
5 Water Enforcement Division
6 Office of Civil Enforcement
7 Office of Enforcement and Compliance Assurance
8 U.S. Environmental Protection Agency
9 1200 Pennsylvania Ave., N.W.
10 Washington, D.C. 20460
11 202.564.4001
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Dated: 9.30.11

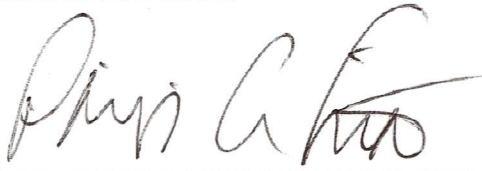
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25 CONSENT DECREE
26 Case No. 3:10-cv-05364-BHS

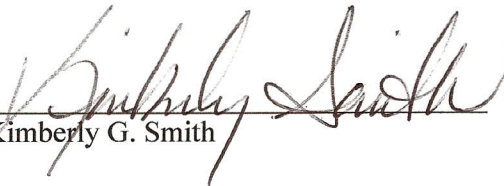
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1 FOR DEFENDANTS

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4 Philip A. Smith

Dated: 10/5/11

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8 Kimberly G. Smith

Dated: 10/5/11

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25 CONSENT DECREE
Case No. 3:10-cv-05364-BHS

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